No. 16567

In the Supreme Court of the United States

OCTOBER TERM, 1921.

TAKUJI YAMASHITA and
CHARLES HIO KONO,

Petitioners,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Petition for Writ

CORWIN S. SHANK,
Attorney for Petitioners.

1002 Alaska Building
SEATTLE

PRESS OF PLINY L. ALLEN CO., SEATTLE

In the Supreme Court of the United States

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TAKUJI YAMASHITA and
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J. GRANT HINKLE, as Secretary of State of the State of Washington,

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ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Petition for Writ

To the Honorable the Supreme Court of the United States:

The petition of Takuji Yamashita and Charles Hio Kono respectfully shows to this honorable court as follows:

On the 14th day of May, 1921, these petitioners

filed in the Supreme Court of the State of Washington (being the court having jurisdiction of the person of the defendant and the subject matter of the cause of action hereinafter set forth) their application for a writ of mandate requiring the respondent to accept and file certain articles of incorporation theretofore tendered to the respondent and described in the said application. This application was supported by the affidavit of the petitioners wherein they stated that they were of the Japanese race, but had been duly admitted to citizenship in the United States by a Superior Court of the State of Washington after all proceedings required in such cases under the naturalization laws of the United States of America had been duly had. Said affidavit further showed that desiring to form a corporation under the laws of the State of Washington, these petitioners had duly executed and tendered to the respondent articles of incorporation of such corporation, but that the respondent had refused to accept and file such articles of incorporation and still refuses so to do upon the claim that these petitioners being of the Japanese race were not at the time of their naturalization, and never at any time had been, entitled under the naturalization laws of the United States of America, to be admitted to citizenship in the United States of America, and were therefore not entitled under the laws of the

State of Washington to form such a corporation as these petitioners were attempting to form. The said affidavit further showed that the said respondent was thereby depriving these petitioners of a right of citizenship duly guaranteed to them by the constitution and laws of the United States of America, and particularly by the Fourteenth Amendment to the constitution of the United States and the naturalization laws of the United States.

The said respondent thereafter duly appeared in said cause and demurred to the said application and affidavit in support thereof upon the sole and only ground that the said application and affidavit did not contain facts sufficient to constitute a cause of action.

The said cause came duly on for hearing before department two of the Supreme Court of the State of Washington upon the 20th day of May, 1921, upon the said application and affidavit of these petitioners and the said demurrer of the respondent and the respective briefs of both parties, and thereupon the said application of these petitioners was denied by the said department of said court.

Thereafter and within the time required by the statute of the State of Washington and the rules and practice of the said Supreme Court of the State of Washington, these petitioners filed their petition for rehearing both before the said

department and before the entire court *en banc,* and in the said petition for rehearing these petitioners again raised the claim that by the action of the respondent and of the said court they were being deprived of their right of citizenship guaranteed to them by the constitution and laws of the United States of America, but the said petition having been duly considered by the said Supreme Court of the State of Washington *en banc,* was, by the court on the 28th day of June, 1921, denied, and the said order was a final judgment in the highest court of the State of Washington in which a decision in said matter could or can be had and these petitioners are without remedy unless this Honorable Court grants this petition for a writ of certiorari.

These petitioners further show that the reasons relied upon by them for the allowance of the said writ are that the judgments and orders of the Supreme Court of the State of Washington, as hereinbefore set forth, deprive these petitioners of a right of citizenship in the United States of America guaranteed to them by the constitution and naturalization laws of the United States of America and theretofore duly bestowed upon them after due and proper proceedings had in a court having jurisdiction of the subject of naturalization, all of the said proceedings having been had in accordance

with the naturalization laws of the United States of America, and further that the said judgments and orders of the Supreme Court of the State of Washington constitute an adjudication that these petitioners are not citizens of the United States of America in spite of the adjudications theretofore had in the Superior Courts of the State of Washington as hereinbefore set forth.

These petitioners present herewith as a part of this petition a brief showing more fully their views upon the questions involved, and furnish as an exhibit hereto a certified copy of the entire transcript of record of the case showing all the proceedings of the said Supreme Court of the State of Washington.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this court, directed to the Supreme Court of the State of Washington, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Supreme Court of the State of Washington in this case, which was entitled in that court "Takuji Yamashita and Charles Hio Kono, Plaintiffs, vs. J. Grant Hinkle, as Secretary of State of the State of Washington, Defendant," to the

end that said cause may be reviewed and determined by this court as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate; and that the said judgment of the Supreme Court of the State of Washington may be reversed by this Honorable Court.

TAKUJI YAMASHITA
CHARLES HIO KONO
By CORWIN S. SHANK,
Attorney for said Petitioners.

CORWIN S. SHANK,
Attorney for said Petitioners.

No. 16567

In the Supreme Court of the United States

OCTOBER TERM, 1921.

TAKUJI YAMASHITA and
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Petitioners,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Transcript of Record

CORWIN S. SHANK,
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1002 Alaska Building
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In the Supreme Court of the State of Washington.

No. 16567

TAKUJI YAMASHITA and
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In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Defendant.

NOTICE OF HEARING OF APPLICATION.

(Stamp.) Filed in Supreme Court of Washington May 16, 1921. C. S. Reinhart, Clerk. F. S. G.

To the above named defendant, J. Grant Hinkle, as secretary of state of the State of Washington:

You are hereby notified that the plaintiffs will call the attached application for writ of mandate up for hearing before the Supreme Court of the State of Washington at its court room in the temple of justice in the City of Olympia, Washington, upon the sitting of the said court in its morning session on the 20th day of May, 1921, or as soon thereafter as the said matter can be heard.

(Signed) SHANK, BELT & FAIRBROOK,

Attorneys for said Plaintiffs.

In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Defendant.

APPLICATION FOR WRIT OF MANDATE.

(Stamp.) Filed in Supreme Court of Washington May 14, 1921. C. S. Reinhart, Clerk. F. S. G.

Comes now Takuji Yamashita and Charles Hio Kono and make application herein for a writ of mandate directed to the above named defendant J. Grant Hinkle, as secretary of state of the State of Washington, requiring the said J. Grant Hinkle to receive and file the articles of incorporation of Japanese Real Estate Holding Company, heretofore tendered to the said defendant by the said plaintiffs as set forth in the accompanying affidavit. This application is based upon the affidavit hereto attached, which is hereby referred to and made a part of this application.

(Signed) SHANK, BELT & FAIRBROOK,

Attorneys for said Plaintiffs.

In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA et al.,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Defendant.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR WRIT OF MANDATE.

State of Washington, County of King. ss.

TAKUJI YAMASHITA, being first duly sworn, on oath deposes and says:

I am one of the above named plaintiffs and make this affidavit on behalf of myself and my above named co-plaintiff for the purpose of obtaining a writ of mandate out of this court directed to the above named defendant J. Grant Hinkle, as secretary of state of the State of Washington, requiring the said defendant to receive and file articles of incorporation of Japanese Real Estate Holding Company heretofore tendered to the said defendant by these plaintiffs as hereinafter set forth; the said defendant is the duly elected, qualified and acting secretary of state of the State of Washington; these plaintiffs are each of them natives of the Empire of Japan, but after all proceedings required under the

naturalization laws of the United States of America had been had each of these plaintiffs have been duly naturalized by a superior court of the State of Washington, and have been duly admitted to citizenship in the United States of America by such superior courts, and this affiant is now and for more than ten years last past has been an actual and bona fide resident of the State of Washington. Heretofore these plaintiffs, desiring to form a corporation under and pursuant to the laws of the State of Washington to be known as Japanese Real Estate Holding Company, duly made, executed and acknowledged in triplicate articles of incorporation of said Japanese Real Estate Holding Company, a true and correct copy of which articles is hereto attached and marked "Exhibit A," hereby referred to and by this reference made a part of this affidavit, and upon the 5th day of May, 1921, tendered one original copy of such articles so duly executed and acknowledged together with the necessary filing fee to the said defendant and demanded that he accept and file the same, but the said defendant refused to accept and file the same and still refuses so to do upon the claim that these plaintiffs being of the Japanese race were not at the time of their naturalization and never at any time have been and are not now entitled under the naturalization laws of the United States

of America to be admitted to citizenship in the United States of America and are therefore not entitled under the laws of the State of Washington to form a corporation with sole power of acquiring and holding real estate within the State of Washington, or to file articles of incorporation naming these plaintiffs as sole trustees of the said corporation; thereby the said defendant is depriving these plaintiffs of a right of citizenship duly guaranteed to them by the constitution and the laws of the United States of America and of the State of Washington, and particularly by the fourteenth amendment to the constitution of the United States and the naturalization laws of the United States, and these plaintiffs have no plain, speedy or adequate remedy in the course of law and therefore herewith make application to this court for a writ of mandate directing and commanding the said defendant to accept and file the said articles of incorporation.

(Signed) TAKUJI YAMASHITA.

Subscribed and sworn to before me this 6th day of May, 1921.

(Signed) H. C. BELT.

Notary Public in and for the State of Washington, residing at Seattle.

EXHIBIT "A."

ARTICLES OF INCORPORATION of JAPANESE REAL ESTATE HOLDING COMPANY.

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned, TAKUJI YAMASHITA and CHAS. HIO KONO, both being natives of Japan, but being duly naturalized citizens of the United States of America, and the said Takuji Yamashita being a resident of the State of Washington, do hereby associate ourselves together for the purpose of forming a corporation under the general incorporation laws of the State of Washington relating to the organization and management of private corporations, and do hereby certify and adopt the following

ARTICLES OF INCORPORATION.

Article I.

The name of this corporation shall be JAPANESE REAL ESTATE HOLDING COMPANY.

Article II.

The objects and purposes for which this corporation is formed are and shall be: To buy and otherwise acquire, own, hold, develop, improve, manage,

sell, convey, transfer and lease and dispose of real estate of every nature and description within the State of Washington.

ARTICLE III.

The capital stock of this corporation shall be ten thousand dollars, divided into one hundred shares of the par value of one hundred dollars each.

ARTICLE IV.

The time of the existence of this corporation shall be fifty years.

ARTICLE V.

The principal place of business of this corporation shall be Seattle, King County, Washington.

ARTICLE VI.

The number of trustees of this corporation shall be two, and the names of those of the trustees who shall manage the concerns of the corporation until the 5th day of September, 1921, shall be TAKUJI YAMASHITA and CHAS. HIO KONO.

IN WITNESS WHEREOF, the said TAKUJI YAMASHITA and CHAS. HIO KONO have hereunto set their hands and seals in triplicate this 5th day of April, 1921.

TAKUJI YAMASHITA, (Seal.)
CHAS. HIO KONO. (Seal.)

State of Montana, County of Chouteau, *ss.*

THIS IS TO CERTIFY, that on this 12th day of April, 1921, before me, the undersigned, a notary public in and for said county and state, personally appeared Chas. Hio Kono to me personally known to be the individual described in and who executed the foregoing Articles of Incorporation, and duly acknowledged to me that he signed the same as his own free act and deed, for the uses and purposes therein mentioned.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my notarial seal this the day and year in this certificate first above written.

WILL J. BOWMAN,

(Seal.) Notary Public in and for the State of Montana, residing at Big Sandy. My commission expires Feb. 28th, 1924.

State of Washington, County of King. *ss.*

THIS IS TO CERTIFY, that on this 4th day of May, 1921, before me, the undersigned, a notary public in and for said county and state, personally appeared TAKUJI YAMASHITA, to me known to be the individual described in and who executed the foregoing Articles of Incorporation, and duly acknowledged to me that he signed the same as his own

free act and deed, for the uses and purposes therein mentioned.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

H. C. BELT,
Notary Public in and for the State of Washington, residing at Seattle.

In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Defendant.

DEMURRER.

(Stamp.) Filed in Supreme Court of Washington May 16, 1921. C. S. Reinhart, Clerk. F. S. G.

Comes now the defendant and demurs to the application for writ of mandate, and the affidavit in

support of such application, and each of them, in the above entitled case, for the reason that such application and affidavit do not contain facts sufficient to constitute a cause of action.

(Signed) L. L. THOMPSON,
Attorney General.
NAT U. BROWN,
Attorneys for Defendant.

Office and Post Office Address:
Temple of Justice, Olympia, Washington.

(Stamp.) Copy hereof received this May 13, 1921.
Shank, Belt & Fairbrook.

In the Supreme Court of the State of Washington.
No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,
Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,
Defendant.

BRIEF OF PLAINTIFFS.

(Stamp.) Filed in Supreme Court of Washington May 19, 1921. C. S. Reinhart, Clerk. F. S. G.

It is not the desire of the plaintiffs here to enter

into any extended arguments on the merits of this case. It is apparent in the case of In re Yamashita, 30 Wash. 234, which so far as we know has never been modified by this court nor overruled by the United States courts, that the view of this court is that Yamashita is not a citizen of the United States. Inasmuch as the same conclusion would undoubtedly have been reached with respect to Kono, it is apparent, unless we could convince the court that in the decision in 30 Washington was erroneous, no good purpose would be subserved by extended argument.

It is the desire, however, of counsel with whom counsel for plaintiffs in this action are associated to present this matter to the Supreme Court of the United States, and inasmuch as we entertain no hope of changing the court's view as to the correctness of the decision in re Yamashita we desire to submit the case on the brief of counsel for applicant in that case, and without citation of further authority.

In support of the petition herein the court is respectfully referred to the case of *In re Rodriquez,* 81 Fed. 337.

We respectfully wish to request the court, however, that as early a decision be rendered on the peti-

tion herein as the business of the court will permit of.

Respectfully,

(Signed) SHANK, BELT & FAIRBROOK,
Attorneys for Plaintiffs.

In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Defendant.

DEFENDANT'S POINTS AND AUTHORITIES.

(Stamp.) Filed in Supreme Court of Washington May 19, 1921. C. S. Rinehart, Clerk. F. S. G.

The plaintiffs herein are applying to this court for writ of mandamus directed against J. Grant Hinkle as Secretary of State, requiring him to receive and file articles of incorporation of a certain Japanese real estate holding company of which they are the incorporators. In the affidavit and in the proposed articles of incorporation the plaintiffs recite that they are both natives of Japan and have

been duly naturalized citizens of the United States. The defendant has demurred to the application and affidavit and the matter comes on to be heard upon that demurrer.

The sole question involved is whether these plaintiffs are citizens of the United States. It may be conceded by the defendant that these plaintiffs are in possession of citizenship papers issued by the superior court of Pierce County in May, 1902. The contention of the defendant is that the order of the superior court admitting these plaintiffs to citizenship was void and of no effect.

The question is not an open one in this state, having been decided adversely to these plaintiffs in *re Yamashita,* 30 Wash. 234. In that case one of these plaintiffs sought admission to the bar of the state of Washington. This court held that the judgment of the superior court admitting him to citizenship shows upon its face that the court was without authority and such judgment may be attacked at any time and in any proceeding. It further held that the right of naturalization being restricted to free white persons, to aliens of African nativity and to persons of African descent, a native of Japan would not be entitled to citizenship.

The purpose of this action is to obtain a later adjudication of the matter by this court so that the

question may be presented to the Supreme Court of the United States upon a writ of error. Upon the authority of the Yamashita case the writ should be denied.

Respectfully submitted,
(Signed) L. L. THOMPSON,
Attorney General.
NAT U. BROWN,
Attorneys for Defendant.

Office and Post Office Oddress:
Temple of Justice, Olympia, Washington.

In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Defendant.

ORDER.

Friday, May 20, 1921. (Stamped.) Filed in Supreme Court of Washington. C. S. Reinhart, Clerk.

F. S. G.

It is by the court ordered that the petition for mandamus in the above entitled cause be, and the same is hereby denied.

In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Defendant.

PETITION FOR RE-HEARING.

(Stamp.) Filed in Supreme Court of Washington June 9, 1921. C. S. Reinhart, Clerk. F. S. G.

Come now the above mentioned plaintiffs, Takuji Yamashita and Charles Hio Kono, and respectfully petition this court for a re-hearing either before the department that heard the said application, or before the entire court en banc, as to the court shall seem proper. The petition is made upon the following grounds, to-wit:

The decision of the department herein denying the writ of mandamus asked for herein deprives these plaintiffs of a right of citizenship guaranteed to them by the Constitution and Laws of the United States of America, and the State of Washington, and particularly by the 14th Amendment to the Con-

stitution of the United States, and the Naturalization Laws of the United States.

Respectfully submitted,

(Signed) SHANK, BELT & FAIRBROOK,

Attorneys for Plaintiff.

In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Defendant.

EN BANC.

Order: Tuesday, June 28, 1921.

(Stamp.) Filed in Supreme Court of Washington. C. S. Reinhart, Clerk. F. S. G.

The petition for rehearing in the above entitled cause having been heretofore submitted to the court, and the court having fully considered the same, and being fully advised in the premises, it is now by the court ordered that the said petition be, and the same is, hereby denied.

In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Respondent.

JUDGMENT.

This cause having been heretofore submitted to the court upon the petition of the plaintiffs for a writ of mandamus to compel the respondent to receive and file the articles of incorporation of the Japanese Real Estate Holding Co., and upon the argument of counsel, and the court having fully considered the same, it is now here ordered and adjudged that the petition be, and the same is, hereby denied and that the said J. Grant Hinkle, as Secretary of State, have and recover of and from the said Takuji Yamashita and Charles Hio Kono the costs of this action taxed and allowed at Fifteen Dollars, and that execution issue therefor.

In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Defendant.

PRAECIPE.

Filed in Supreme Court of Washington, Jul. 11, 1921. C. S. Reinhart, Clerk. F. S. G.

To the Clerk of said Court:

Please prepare transcript of the entire record in the above entitled case.

(Signed) SHANK, BELT & FAIRBROOK,
Attorneys for Plaintiffs.

State of Washington, County of Thurston. *ss.*

I, C. S. REINHART, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of the record in the above entitled cause as the same now remains of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Court this 8th day of August, 1921.

C. S. REINHART,

(Seal.) *Clerk.*

No. 16567

In the Supreme Court of the United States

OCTOBER TERM, 1921.

TAKUJI YAMASHITA and
CHARLES HIO KONO,

Petitioners,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Brief of Petitioners

CORWIN S. SHANK,
Attorney for Petitioners.

1002 Alaska Building
SEATTLE

PRESS OF PLINY L. ALLEN CO., SEATTLE

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CASES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1921.

TAKUJI YAMASHITA and
CHARLES HIO KONO,
Petitioners,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,
Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Brief of Petitioners

Statement of the Case.

The petitioners in this case are of the Japanese race but were duly naturalized in superior courts of the State of Washington. Desiring to exercise

a right of citizenship they sought to form a corporation but the respondent refused to accept the tendered articles of incorporation upon the sole ground that in spite of their certificates of naturalization he did not consider them citizens of the United States and concluded that they were therefore not eligible to form the corporation which they were endeavoring to form. Thereupon the petitioners made application to the supreme court of the State of Washington for a writ of mandate directed to the respondent to compel him to accept and file such articles of incorporation. The respondent demurred to the application and supporting affidavit of these petitioners, thereby admitting the facts as hereinabove set forth. Upon the hearing the only question advanced by both parties was the question of whether the petitioners were citizens of the United States and the supreme court of the State of Washington refused the application, and to review the final order refusing this application these petitioners now petition this Honorable Court for a writ of certiorari.

Assignment of Error.

These petitioners respectively submit that under the facts stated they are citizens of the United States of America and are entitled to all the rights

and privileges of such citizens and that the judgments and orders of the supreme court of the state of Washington deprive them of such rights.

ARGUMENT.

The Statutes of the Case.

The decision of this case depends upon the interpretation of three paragraphs of the federal statutes as follows: "Sec. 2165. An alien may be admitted to become a citizen of the United States in the following manner * * * ."

Revised Statutes, §2165.

"Sec. 2169. The provisions of this title shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent."

Revised Statutes, §2169.

"Sec. 14. That hereafter no state court, or court of the United States, shall admit Chinese to citizenship, and all laws in conflict with this act are hereby repealed."

22 *Stat. L.* 58, Chap. 126, §14.

These three provisions have resulted in one of the most curious mazes of legal interpretation of any statutes ever passed. The first quoted section is expressly inclusive of all aliens. The second quoted section extends naturalization to "free white per-

sons" and persons of African nativity or descent. The third statute denies citizenship to Chinese and expressly repeals "all laws in conflict with this act." The second section 2169 includes classes of persons that were already included in section 2165 and section 14 excludes a class of persons that were included in section 2165 but were not included in section 2169. Such a conflict of provisions cannot help but result in the hopeless maze of decisions that have resulted and must continue a puzzle to the naturalization courts of this country until this court renders its authoritative decision thereon.

THE CONFLICT IN THE DECISIONS ON THIS QUESTION.

Before the decision *In re Yamashita,* 30 Wash. 234, Japanese were frequently admitted without question in many of the western courts, and among the Japanese so admitted were these two petitioners. Whether they were admitted upon the court's interpretation of the statute to mean that persons of all races except Chinese were admissible or whether the court took judicial notice of the fact that the Japanese race was predominantly Caucasian, or whether the court found that these particular Japanese were as a matter of fact free white persons, does not appear, but it does appear that the court admitted these petitioners to citizenship.

In 1894 Circuit Judge Colt in the Circuit Court

of the District of Massachusetts in the case of *In re Saito,* 62 Fed. 126, decided that a Japanese was not admissible to citizenship, founding his opinion chiefly upon various statements found in the debates of Congress at the time of the passage of the act, and ethnological classifications by various text book writers who may never have seen a member of the Japanese race and whose writings may never have been read by a single member of Congress who passed the act. This decision in so far as the Japanese are concerned has been blindly followed by the only subsequent decisions which appear in the reports, apparently without any independent investigation as to the proper ethnological classification of the Japanese race.

In re Kumagai, 163 Fed. 922 (D. C. W. D. Wn. N. D.)

In re Yamashita, 30 Wash. 234.

In re Narasaki, 269 Fed. 643. (D. C. S. D. N. Y.)

All of these decisions assume as a matter of judicial notice that a Japanese is a Mongol and follow the interpretation of the statute laid down in *In re Saito* that Sec. 2169, under the theory of *expressio unius est exclusio alterius,* excludes all but white and black and entirely ignore the same theory when it comes to interpreting the clause of the statute excluding Chinese and repealing all laws in conflict therewith.

The next time these provisions came up for interpretation in relation to an Asiatic was in the case of *In re Knight,* 171 Fed. 299, wherein the District Court of the Eastern District of New York decided that an applicant whose father was an Englishman and whose mother was one-half Chinese and one-half Japanese was not white enough to be admitted, but immediately thereafter a Syrian making application for admission in the case of *In re Najour,* 174 Fed. 735 (C. C. N. D. Ga.), the Circuit Court for the Northern District of Georgia ignored the aforesaid debates in Congress to the effect that all Asiatics must be excluded and, following a more modern authority on ethnology, took judicial notice of a work by A. H. Keane to the effect that a Syrian was a white man, and also, finding from inspection, that the applicant "was not particularly dark," concluded that he was therefore entitled to admission.

Almost simultaneously therewith, in *In re Halladjian,* 174 Fed. 834 (C. C. D. Mass.), Judge Lowell decided that four Armenians were white enough to be admitted by reason of the fact that both historical and modern ethnological authorities agree that Armenians had a considerable proportion of white blood in them and that the applicants were no darker than many other applicants that had been

admitted in the same court. This decision was followed in the case of Syrians in *In re Mudarri,* 176 Fed. 465 (C. C. D. Mass.), and in the District Court for the District of Oregon in *In re Ellis,* 179 Fed. 1002.

Next comes the case of a Parsee from Bombay in *In re Balsara,* 171 Fed. 294 (C. C. S. D. N. Y.), and *U. S. vs. Balsara,* 180 Fed. 694 (C. C. A. 2nd Cir.). This applicant was admitted by the Circuit Court of the Southern District of New York upon the express grounds that a satisfactory interpretation of the statute was impossible and as the government was prepared to appeal from an order admitting the applicant to citizenship such an order should be entered in order to obtain a ruling by the Circuit Court of Appeals. The Circuit Court of Appeals for the Second Circuit held that the term "free white person" meant Caucasian regardless of the shade of white, and further took judicial notice of an immigration of Parsees from Persia into India supposed to have happened some 1200 years ago, and accordingly concluded that a Parsee was entitled to naturalization.

A Philippino was decided not to be a white person in *In re Alverto,* 198 Fed. 688 (D. C. E. D. Pa.), *In re Lampitoe,* 232 Fed. 382 (D. C. S. D. N. Y.), *In re Mallari,* 239 Fed. 416 (D. C. D. Mass.), and

In re Rallos, 241 Fed. 686 (D. C. E. D. N. Y.); but was declared worthy of citizenship in *In re Bautista,* 245 Fed. 765 (D. C. N. D. Cali.).

In *In re Akhay Kumar Mozumbdar,* 207 Fed. 115 (D. C. E. D. Wn.), Judge Rudkin accepted the testimony of a Hindu to the effect that he was a white man and accordingly ordered him admitted to citizenship.

The opposite conclusion regarding a Hindu was reached by Judge Dickerson in the District Court for the Eastern District of Pennsylvania in *In re Sadar Bhagwab Singh,* 246 Fed. 496, who disregarded ethnological classifications and drew the color line closely, and concluded that inasmuch as the Hindu before him was not white he was not admissible.

In the cases, however, of *In re Mohan Singh,* 257 Fed. 209 (D. C. S. D. Cal.), and of *In re Bhagat Singh Thind,* 268 Fed. 683 (D. C. Ore.), the courts concluded that the Hindu was eligible to citizenship, the decision in the latter case being based upon what the judge considered the weight of authority.

Koreans were refused admission in the *Petition of Easurk Emsen Charr,* 273 Fed. 207 (D. C. W. D. Mo.), and in *In re En Sk Song,* 271 Fed. 23 (D. C. S. D. Cal.).

This, we believe, is the complete list of the reported cases on the question of the admissibility of

Asiatics to citizenship in the United States. Only two of these cases came to a Circuit Court of Appeals, the state courts in the meantime having been busy admitting and refusing applicants without their opinions being reported, each judge following his own ideas as to whether the applicant was admissible or not. It will be seen that some judges follow classifications laid down by authors who were dead before Japan was open to foreigners and who perhaps never saw a member of the Japanese race or even talked with anyone who had seen a member of the Japanese race. Some judges passed upon whether the applicant was white by personal inspection; some by listening to the applicant's statement as to his ancestors; some by searching through ancient history and weighing the probabilities of whether the Mongol or the Caucasian was predominant in the race. Every conceivable method of deciding this matter has been adopted by various courts and will continue to be adopted until this court furnishes some definite rule to be followed. In the meantime, either many applicants are admitted to citizenship who are not entitled under the statute to be admitted, or many persons who are lawfully resident in this country, whose children are citizens, who are themselves anxious to become citizens and would make good citizens, are unwillingly deprived

of their right by reason of the fact that back in 1781 an individual named Blumenbach compiled a classification of mankind in which he declared a Japanese to be a Mongol and this classification has since been followed by various trial courts.

THE TRUE INTERPRETATION OF THESE STATUTES.

As we have said before, a consistent application of the maxim *expressio unius est exclusio alterius* would if applied consistently bring us to the conclusion that the Japanese are admissible. Sec. 2169 as originally passed applied the title to Africans. An interpretation that only Africans were admissible to citizenship would be ridiculous, but nevertheless, to save the question, this was corrected so as to make the section read as hereinbefore set forth. But if only whites and blacks are admissible to citizenship what was the reason for the act of 1882 forbidding the admission of Chinese? It can only be explained upon the theory that Congress concluded the Chinese admissible and intended to forbid the admission of Chinese and Chinese only. Therefore the application of this maxim *expressio unius est exclusio alterius* to the statutes would render Japanese admissible. Reference to the debates in Congress bring us nowhere because at that time there was no idea of an influx of Japanese, or Syrians, or Hindus, or any Asiatics excepting the Chinese, and the Chinese are effectually barred by

the act of 1882. Debates in Congress were considered when it was a question of admitting Japanese, but were ignored when it came to admitting other Asiatics.

What, then, did Congress mean by Sec. 2169? The answer is contained in an historical fact which is well illustrated in the next title of the Revised Statutes relating to the census. Congress had in mind a classification of but three classes—white, black and Indians. Indians were disregarded in the naturalization act because they were in the peculiar situation of being neither citizens nor aliens, but "wards of the government." Blacks were cared for by extending the privilege of naturalization to them. Sec. 2165 extended the right of naturalization to any alien, and the correction of Sec. 2169 made it certain that no white person would be excluded. What reason is there to believe that Congress thereby intended to exclude Japanese any more than there is to believe that Congress intended to exclude whites when the original Revised Statutes were enacted?

In the succeeding title of the Revised Statutes, being Title XXXI., relating to the census, Sec. 2176, provides for the enumeration of all inhabitants, omitting from the enumeration of inhabitants "Indians not taxed," while Sec. 2206 described the schedules of this enumeration, and one of the classifications in the schedules is "Color: White, black or

mulatto." This is the classification made by Congress of inhabitants of this country. No one can claim that it is scientific or that it is accurate, but it is the one distinction of color and the only distinction in which Congress was interested at that time. Their classification was white and black. That embraced all mankind and their extension of the privilege of naturalization to whites and Africans was intended to cover the world.

The decisions which we have cited assume that a member of the Japanese race was a Mongolian. This assumption in the earlier decisions was expressly based upon the classifications of theorists of the eighteenth century and the early part of the nineteenth century. These theories were promulgated when Japan was a closed country. Later authorities have thrown a doubt upon this classification and have rendered it not impossible that a member of the Japanese race could be considered at least a member of the Aryan or Caucasian race. We will not burden this court with lengthy extracts from these authorities, but ask this court's indulgence for the privilege of showing this fact hereafter.

We submit that we have shown that the decisions upon the admission of Asiatics to citizenship are, owing to the obscurity of the statute law and the general difficulty of the matter, hopelessly at vari-

ance with each other, and that each judge holding a naturalization court at present follows the dictates of his own judicial discretion in a matter that should follow an absolutely certain rule. We would therefore respectfully ask that the petitioners' petition for a writ of certiorari be granted to the end that this matter, which is of great importance to the country, should be finally and authoritatively settled.

Respectfully,

CORWIN S. SHANK,

Attorney for Petitioners.

IN THE

Supreme Court of the United States

October Term, 1922

[No. 177.]

TAKUJI YAMASHITA and CHARLES HIO KONO,
Petitioners,

against

J. GRANT HINKLE, as Secretary of State of the State of Washington,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington.

BRIEF FOR PETITIONERS

COBWIN S. SHANK,
Attorney for Petitioners.

GEO. W. WICKERSHAM,
of Counsel.

INGLE, INC., 165 William Street, New York City.

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IN THE

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BRIEF FOR PETITIONERS.

Statement.

This petition was granted to review a judgment rendered by the Supreme Court of Washington refusing a writ of mandamus to compel the respondent, the Secretary of State of the State of Washington, to receive and file articles of incorporation of the Japanese Real Estate Holding Company, prepared and executed in conformity with the General Corporation Laws of that State, relating to the organization and the management of private corporations, for the sole reason that the petitioners, the incorporators named in said articles of incorporation, are both natives of Japan, although duly naturalized citizens of the United States.

A stipulation filed by counsel sets forth:

> "The sole question involved is whether these plaintiffs are citizens of the United States. It

> may be conceded by the defendant that these plaintiffs are in possession of citizenship papers issued by the Superior Court of Pierce County in May, 1902. The contention of the defendant is that the order of the Superior Court admitting these plaintiffs to citizenship was void and of no effect" (Rec., p. 7).

The action of the defendant was based upon a decision of the Supreme Court of the State of Washington in the case of *In re Yamashita,* 30 Wash., 234. In that case, one of these plaintiffs sought admission to the bar of the State of Washington. The Supreme Court held that the judgment of the Superior Court admitting him to citizenship showed upon its face that the court was without authority, and that such judgment might be attacked at any time and in any proceeding. It further held that the right of naturalization, being restricted to free white persons, to aliens of African nativity, and to persons of African descent, a native of Japan was not entitled to citizenship (Rec., p. 7).

The sole question involved on this appeal, therefore, is whether or not the State court, in naturalizing the two petitioners, acted without jurisdiction, because (1) its jurisdiction was limited to the naturalization of *(a)* free white persons *(b)* aliens of African nativity and *(c)* persons of African descent; and (2) because a native of Japan does not fall within any of these categories.

Assignment of Error.

Petitioners submit that the Supreme Court of the State of Washington erred in holding that the Superior Court of Washington was without jurisdiction to naturalize these petitioners, and that these petitioners were not "free white persons" within the meaning of the Act of Congress applicable to naturalization.

Argument.

A. Judicial Authorities.

The statute in force at the time of the issue of certificates of naturalization to these petitioners was Title XXX of the U. S. Revised Statutes, entitled "Naturalization," enacted in 1873-4, as amended by the Act of February 18, 1875, 18 Stat. 316, and as revised in 1878. Prior to the Revised Statutes, the various Acts of Congress providing for naturalization, beginning with the first act, namely, that approved March 26, 1790 (1 Stat. 103), provided for the naturalization of "any alien, being a free white person," who should meet the requirements of the Act. (See also Act of January 29, 1795, 1 Stat. 414; Act of April 14, 1802, 2 Stat. 153, as supplemented by Act of May 26, 1824, 4 Stat. 69). Certain exceptions to this limitation were contained in Acts providing for the naturalization of "any alien" who should have served in the army or navy, or as a seaman on a merchant ship of the United States (see Act of July 17, 1862, 12 Stat. 594, 597; Act of June 7, 1872, 17 Stats. 262, 268).

By an Act passed July 14, 1870 (16 Stats. 254), it was provided

> "that the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent."

In the codification of the statutes into the first revision, enacted 1873-4, the words "being a free white person," were dropped out of the first section in Title XXX dealing with naturalization, and a section, numbered 2169, was inserted, reading:

> "The provisions of this title shall apply to aliens of African nativity and to persons of African descent."

On February 18, 1875, an Act (18 Stat. 316) was passed to correct errors and supply omissions in the Revised Statutes, which amended Section 2169 by inserting in the first line after the word "aliens," the words "being free white persons, and to aliens" (p. 318), so that the section thereafter should read:

> "The provisions of this title shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent."

Between December 31, 1873, and February 18, 1875, therefore, there was no restriction whatever respecting race, origin or color of applicants for naturalization, and during this period, it was held that Chinese were eligible to citizenship.

> *In re Ah Yup*, 5 Sawyer, 155; Fed., Cas. No. 104;
> *In re Ah Chong*, 2 Fed., 733, 739.

The general law applicable to naturalization, aside from the exceptional cases of seamen and soldiers, remained unchanged in applying only to aliens being white or of African nativity or of African descent until after the issuance of citizenship papers to the petitioners in May, 1902. As it is admitted that the petitioners were not of African nativity or of African descent, the question arises whether, being natives of Japan, they come within the general description of "free white persons," within the meaning of the statute. These words for years have given rise to great confusion in their interpretation by the Circuit and District Courts of the United States.

Circuit Judge Lowell, in admitting to naturalization a Syrian, born in Damascus, as a "white" person, held, that cases of difficulty were likely to arise in construing Section 2169, unless its wording be changed, and the

intent of Congress made to appear. *In re Hudson*, 179 Fed., 665, that section, he said,

> "implies a classification of some sort. What may be called for want of a better name the Caucasian-Mongolian classification is not now held to be valid by any considerable body of ethnologists. To make naturalization depend upon this classification is to make an important result depend upon the application of an abandoned scientific theory, a course of proceeding which surely brings the law and its administration into disrepute. Since it is impossible to substitute a modern and accepted theory for one which has been abandoned. No modern theory has gained general acceptance. Hardly any one classifies any human race as white, and none can be applied under Section 2169 without making distinctions which Congress certainly did not intend to draw; *e. g.*, a distinction between the inhabitants of different parts of France. Thus, classification by ethnological race is almost or quite impossible. On the other hand, to give the phrase 'white person' the meaning which it bore when the first naturalization act was passed, viz., any person not otherwise designated or classified, is to make naturalization depend upon the varying and conflicting classification of persons in the usage of successive generations and of different parts of a large country. The court greatly hopes that an amendment of the statutes will make quite clear the meaning of the word 'white' in Section 2169" (p. 667).

The hope thus expressed has not been realized, and Congress has done nothing to clarify the meaning of the phrase "white person" in the naturalization law, even in the general revision of that law enacted in 1906 or the amendment of 1920. That in 1790, when the first Act was passed, the intention of Congress was to discriminate between the negroes, persons of African birth or descent, on the one hand, and all other immigrants coming to the country, would seem to be obvious. In a very

learned and closely reasoned opinion by Circuit Judge LOWELL, *In re Halladjian*, 174 Fed., 834, the learned Judge says (p. 841):

> "If we pass from racial speculation and remote history to the usage of the colonies and of the United States in statutes and in official documents, the interpretation of the word 'white' will be found less difficult. In this interpretation the statutes for taking the census and the actual classification employed therein are instructive. A census, dealing with all inhabitants (except untaxed Indians in some cases), cannot discriminate against any inhabitant by omission. The Massachusetts census of 1764 classified the inhabitants of the province as whites, negroes an d mulattoes, Indians and 'French neutrals.' The Rhode Island census of 1748 as whites, negroes and Indians; that of 1774 as whites, blacks and Indians. The Connecticut census of 1756 classified the persons enumerated as whites, negroes and Indians; that of 1774 as whites and blacks. The blacks were classified as negroes and Indians. The New York census of 1698 classified the persons enumerated as men, women, children and negroes; that of 1723 as whites, negroes, and other slaves; those of 1731, 1737, 1746, 1749, 1756 and 1771 as white and black; that of 1786 as whites, slaves and 'Indians who pay taxes.' The New Jersey census of 1726 classified the persons enumerated as whites and negroes; that of 1737-38 as whites, negroes, and other slaves. The Maryland census of 1755 classified the persons enumerated as whites and blacks. A Century of Population Growth in the United States, published by the Department of Commerce and Labor in 1909, chapter on White and Negro Population, and Enumerations of Population in North America prior to 1790, 'The population of the earliest English settlements in America,' so the chapter opens, 'was composed of two elements, white and negro. These two elements, though subject to entirely different conditions, continue to compose the population of the republic.' Page 80. Here, again, 'white' is made to include all persons not otherwise specified.

"The census act of 1790 (Act March 1, 1790, c. 2, 1 Stat. 101), provided for a census of all the inhabitants of the United States, except Indians not taxed. These inhabitants were to be classified by 'color,' and the schedule provided by the statute made a classification as free whites, other free persons, and slaves. It is evident from the government publication just quoted that the phrase 'other free persons' was construed to mean 'free negroes,' and this was substantially the classification made in the censuses taken in the first half of the nineteenth century. Act May 23, 1850, c. 11, 9 Stat. 428, 433, for the taking of the seventh and subsequent censuses, provided in the statutory schedule for a classification of free inhabitants by color as 'white, black, or mulatto.' In the census of 1860 the classification was 'white, free colored and slaves,' and the class 'free colored' was subdivided between blacks and mulattoes. Rev. St. Sec. 2206, provided for census schedules classifying all inhabitants of the United States by color as 'white, black, or mulatto,' although there appears to have been special provision for the enumeration of Indians (Act March 1, 1889, c. 319, Sec. 9, 25 Stat. 763), and the enumeration was made accordingly. 'For the censuses from 1790 to 1850, inclusive, the population was classified as white, free negro, and slave only, while for the censuses from 1860 to 1890, inclusive, the population included, besides the white and negro elements, the few Chinese, Japanese, and civilized Indians reported at each of these censuses.' Eleventh Census, part I, p. xciv. In fact, the classification was not uniform in all parts of the country. Census Act March 3, 1899, c. 419, Sec. 7, 30 Stat. 1014 (U. S. Comp. St. 1901, p. 1339), provided for a classification of inhabitants by 'color,' and appears to have left the preparation of schedules to the director of the census. The classification employed, in some instances at least, was as whites, negroes, Indians, Chinese and Japanese. In other instances 'colored,' as opposed to 'white,' was used to include negroes, Chinese, Japanese, and Indians. Throughout the chapter cited in the above-mentioned Bulletin, it is assumed that all persons not

classified as white, in the first eight federal censuses at any rate, were negroes or Indians.

"This use of the word 'white,' which has been illustrated from the censuses, both colonial and federal, is further exemplified in modern statutes, requiring separate accommodation in travel. A statute of Arkansas requires separate accommodation for the 'white and African races,' and provides that all persons not visibly African 'shall be deemed to belong to the white race.' Acts 1891, p. 17, c. 17, Sec. 4. See, also, Laws Fla., 1909, p. 39, c. 5893; Acts Va. 1902-1904 (Extra Sess.), p. 987, c. 609, subc. 4 (Code 1904, Sec. 1294d); Civ. Code S. C. 1902, sec. 2158. Concerning the use of the word 'white' in treating of schools, see Civ. Code S. C. 1902, sec. 1231; Ky. St. 1909 (Russell's) secs. 5607, 5608, 5642, 5765 (Ky. St. 1909, secs. 4523, 4524, 4428, 4487). The recent Constitution of Oklahoma (article 23, sec. 11) reads as follows:

" 'Whenever in this Constitution and laws of this state the words 'colored' or 'colored person,' 'negro' or 'negro race' are used, the same shall be construed to mean to apply to all persons of African descent. The term 'white race' shall include all other persons.'

"References like those made above could be multiplied indefinitely.

"From all these illustrations, which have been taken almost at random, it appears that the word 'white' has been used in colonial practice, in the federal statutes, and in the publications of the government to designate persons not otherwise classified. The census of 1900 makes this clear by its express mention of Africans, Indians, Chinese, and Japanese, leaving whites as a catch-all word to include everybody else. A similar use appears 130 years earlier from the provincial census of Massachusetts taken in 1768, where 'French neutrals' are not reckoned as white persons, notwithstanding their white complexion. Negroes have never been reckoned as whites; Indians but seldom. At one time Chinese and Japanese were deemed to be white, but are not usually so reckoned today. In passing the Act of 1790 Congress did not concern itself particularly with Armenians,

> Turks, Hindoos, or Chinese. Very few of them were in the country, or were coming to it, yet the census taken in that year shows that everybody but a negro or an Indian was classed as a white person. This was the practice of the federal courts. While an exhaustive search of the voluminous records of this court, sitting as a court of naturalization, has been impossible, yet some early instances have been found where not only western Asiatics, but even Chinese, were admitted to naturalization. After the majority of Americans had come to believe that great differences separated the Chinese, and later the Japanese, from other immigrants, these persons were no longer classified as white; but while the scope of its inclusion has thus been somewhat reduced, 'white' is still the catch-all word which includes all persons not otherwise classified."

As a result of his consideration of the subject, the learned Judge found that there is no European or white race, and no Asiatic or yellow race, which includes substantially all the people of Asia; that Armenians had always been reckoned as Caucasians and white persons, and he concluded as follows:

> "We find, further, that the word 'white' has generally been used in the federal and in the state statutes, in the publications of the United States, and in its classification of its inhabitants, to include all persons not otherwise classified; that Armenians, as well as Syrians and Turks, have been freely naturalized in this court until now, although the statutes in this respect have stood substantially unchanged since the First Congress; that the word 'white,' as used in the statutes, publications, and classification above referred to, though its meaning has been narrowed so as to exclude Chinese and Japanese in some instances, yet still includes Armenians. Congress may amend the statutes in this respect. To provide more specifically what persons may be admitted to citizenship seems desirable. While the statutes are unchanged, without proof, if proof be admissible, that the meaning

> of the word 'white' has been still further narrowed, this court will not deny citizenship by reason of their color to aliens who, like the Armenians, have hitherto been granted it."

Judge MAXEY, in the District Court in Texas, in May, 1897, holding that native citizens of Mexico were eligible to American naturalization, said:

> "Indeed, it is a debatable question whether the term 'free white person,' as used in the original act of 1790, was not employed for the sole purpose of withholding the right of citizenship from the black or African race and the Indians then inhabiting this country" *(In re Rodriguez,* 81 Fed., 337).

He held that while, if the strict scientific classification of the anthropologists should be adopted, the Mexican petitioner probably would not be classed as white, he certainly was not a person of African descent, and referring to the Treaty of 1848 with Mexico and the various statutes regarding naturalization of Mexican inhabitants of the territory ceded to the United States, he reached the conclusion that a Mexican was to be considered as a "free white person" within the meaning of the Act of Congress.

Judge BLEDSOE, in the Southern District of California (*In re En Sk Song,* 271 Fed., 23); Judge NEWMAN, in the Northern District of Georgia (*In re Najour,* 174 Fed., 735); Judge WOLVERTON, in the District of Oregon (*In re Ellis,* 179 Fed., 1002), and Judge LOWELL, in the District of Massachusetts (*In re Mudarri,* 176 Fed., 465), have all held that a Syrian was a "white person," within the meaning of the Act of Congress, and, therefore, entitled to naturalization, although disagreeing in the reasoning by which this result was reached.

In *Dow* v. *U. S.,* 226 Fed., 145, the Circuit Court of Appeals for the Fourth Circuit, overruling the District Judge, who had held that "free white persons" included only aliens of European nativity or descent, and holding

a Syrian entitled to naturalization, said, per Woods, *C. J.*, that whatever the general understanding of the term in 1790 might have been, there was no doubt that the meaning had been broadened at the time of the various amending and codifying acts, and that at the time of the amendment of 1875,

> "the generally received opinion was that the inhabitants of a portion of Asia, including Syria, were to be classed as white persons."

The learned Judge said that doubtless when the first Act was passed in 1790, it

> "was intended mainly to provide for naturalization of aliens from Europe, and to deny naturalization to negroes. With other peoples this country had little intercourse and little concern. Accordingly the records of Congress indicate that the debates on the bill of 1790 related to European immigration. It is reasonably certain that Congressmen had no knowledge of Blumenbach's classification of the races of men published in 1781, in which he makes one of the divisions the white or Caucasian race and includes in it 'the western Asiatics on this side of the Caspian Sea and the Ganges'; for his work was not translated from the German and published in English until 1807. The science of ethnology had made little advance in 1790, and the notion of racial division and the meaning of the term 'white' in a comprehensive sense as applied to men were probably quite vague and indefinite in the minds of legislators. Yet in not mentioning the people of Europe, and in extending the privilege of naturalization to any 'free white person,' it seems reasonable to think that the Congress must have believed that there were white persons natives of countries outside of Europe. The writers on the subject of that day, to say the least, were not agreed in the view that Europeans were the only white people" (p. 146).

The Court then pointed out the progress of the science of ethnology, and stated that even if the Congress of

1790 considered that the law of that year would be understood to allow the naturalization of persons of European nativity or descent only, the legislators of later years could not have supposed that the term "free white persons" would carry that restricted meaning; and that at the date of the amendment of 1875, it would seem to be true beyond question that the generally received opinion was that the inhabitants of a portion of Asia, including Syria, were to be classed as white persons.

Judge WOLVERTON, in *In re Ellis*, 179 Fed., 1002, expressed the opinion that the words "'free white persons' are devoid of ambiguity and are of plain and simple signification"—which is rather extraordinary in view of the varying opinions expressed by other Judges.

Judge NEWMAN, in the *Najour* case (174 Fed., 735), held that Syrians belonged to the white or Caucasian race, or to "what we recognize and what the world recognizes as the white race." On the other hand, in two learned opinions, Judge SMITH, in the District of South Carolina, held that Syrians were not entitled to naturalization, and could not be considered as "free white persons" within the meaning of the naturalization acts. *In re Dow*, 211 Fed., 486; on reargument, 213 Fed., 355. The opinion in 211 Federal is a thorough and learned summary of the question in the light of the modern science of ethnology. He rejected, in accordance with the great weight of authority under the decisions of this country, the proposition that the words "free white persons" as applied to an applicant, were to be determined by *ocular* inspection by the court. He also rejected the definition as a *racial* designation, saying:

> "If racial, is any one entitled to be admitted who belongs to a nation that speaks one of the languages spoken by the peoples heretofore denominated Caucasian, whether or not his color be the very reverse of white. This would mean the admission of all the mixed Asiatic races which speak a tongue the descendant of one of the so-

called Indo-European tongues, whether that tongue may have been forced upon them or inherited by a very mixed transmission in point of race. The dark colored, in fact, almost black, inhabitants of Ceylon, speak the Sinhalese language, which is one of the dialects of that branch of the ancient Indo-European language known as Sanscrit, and the dark colored inhabitants of the Persian Gulf or Persian Coast speak a tongue which appears to be the descendant of the ancient Iranian" (p. 487).

He adopted what he termed the *geographical* definition, namely, that the word "white," as used in the statute, referred to the peoples who were then commonly known in this country as the peoples inhabiting Europe, and whose descendants at the time of the passage of the Act of 1790 formed the inhabitants of the United States, excluding from such consideration the African descendants who were then slaves.

On reargument, he pointed out that ethnologists and philologists do not agree as to who are the white races.

> "They will rank different peoples as 'Aryans' or 'Indo-Europeans' or 'Semites' or 'Hamites,' differing even as to who are included in these; but when it comes to 'white' no agreed classification exists. The term white is generally joined to some other by the word 'or' viz., Aryans or white races, etc." (213 Fed., 360).

After a review of the history of the races, he concludes that it is a matter of futile speculation.

> "The broad fact remains," he says, "that the European peoples taken as a whole are the fair skinned or light complexioned races of the world, and form the peoples generally referred to as 'white' and so classed since classification based on complexion was adopted. ALL OF WHICH FOREGOING DISCUSSION MAY SEEM WHOLLY OUT OF PLACE IN A REASONED LEGAL OPINION AS TO THE CONSTRUCTION OF A STATUTE,—EXCEPT AS ILLUSTRATING THE

> SERBONIAN BOG INTO WHICH A COURT OR JUDGE WILL PLUNGE THAT ATTEMPTS TO MAKE THE WORDS 'WHITE PERSONS' CONFORM TO ANY RACIAL CLASSIFICATION" (213 Fed., 364).

The real question, he concluded, was:

> "What does the statute mean, to whom did the terms 'free white persons' refer in 1790, in the understanding of the makers of the law?"

A consideration of this question (see pp. 365-6) led him to the conclusion that the test is mainly one of geography.

> "Is the applicant from Europe and a member of the peoples inhabiting Europe, and there regarded as white, or a descendant of an emigrant from them? If he is, he is entitled to naturalization if he be otherwise fit for it. If he is not, if he is an Asiatic, whether Chinese, Japanese, Hindoo, Parsee, Persian, Mongol, Malay, or Syrian, he is not entitled to the privilege of naturalization, no matter what his fitness otherwise may be" (213 Fed., 366).

In contrast with Judge SMITH's conclusion, Judge BLEDSOE, in the District Court for the Southern District of California (*In re Mohan Singh*, 257 Fed., 209), and Judge RUDKIN, in the Eastern District of Washington (*In re Akhay Kumar Mozumdar*, 207 Fed., 115), held that high caste Hindoos were entitled to naturalization, being members of the Aryan race.

Judge BLEDSOE, reviewing the history of the naturalization act, says:

> "There is nothing that I can discover to indicate anywhere that either the colonies originally or the United States government later, when the federal statute was first passed, had in mind the exclusion from citizenship of any other persons than those referred to, to wit, negroes, Indians, and unfree whites" (257 Fed., 211).

He held that the terms white and Caucasian were interchangeable, and that the preponderance of opinion includes Hindoos of India as members of the Aryan branch or stock of the so-called Caucasian or white race.

Judge RUDKIN, in the *Mozumdar* case, held that whatever the original intent might have been,

> "it is now settled, by the great weight of authority, at least, that it was the intention of Congress to confer the privilege of naturalization upon members of the Caucasian race only."

This intent he infers, not from any contemporary evidence, but wholly from decisions in the courts of the United States, the earliest of which is that of Judge SAWYER, in the *Ah Yup* case, decided 1878 (5 Sawyer, 155). On the other hand, Judge DICKINSON, in the District Court for the Eastern District of Pennsylvania, held that a Hindoo was not entitled to naturalization (*In re Sadar Bhagwab Singh*, 246 Fed., 496). He rejected the test of ocular inspection of color and the test of philological or ethnological authority. The general idea of his opinion seems to be that Congress had a certain notion in the use of the term "free white persons," which did not originally include even members of the Latin races, but which gradually was expanded to embrace French, Spanish, Portuguese, and others, and even Hebrews. This he termed the historical interpretation. He says that this term means

> "that Congress chose its word for the purpose of describing, so far as could be done, although in very general terms, and therefore vaguely, the class, the members of which might enjoy the privilege of citizenship and imposed upon the courts the duty of determining whether the individual applicant belonged to that class. Its further and final meaning, with which we are now concerned, is that the courts may admit to citizenship any person found to belong to that designated class, but no power, except that of Congress, can enlarge that class" (p. 499).

It is a little difficult to follow this reasoning, because the Judge, himself, does not seem to have a very clear idea about it. In general, it would seem to be his idea that the term embraced those different kinds of peoples who, from time to time, according to the general popular opinion, were regarded as the kind of people who ought to be made citizens of the United States. They were to be considered "white," if at the moment there was no general prejudice against them. They were not "white," if at the time there was a general public feeling that they were not desirable. This is perhaps an extreme interpretation, and yet no more exact rule would seem to be deducible from Judge DICKINSON's reasoning.

A Parsee merchant was admitted to naturalization by Judge LACOMBE in the Southern District of New York (*In re Balsara*, 171 Fed., 294), and his order affirmed by the Circuit Court of Appeals (180 Fed., 694). Judge WARD, in writing the opinion of the Circuit Court of Appeals, rejects the historical interpretation and holds that Congress intended by the words "free white persons" to confer the privilege of naturalization upon members of the white or Caucasian race only. "Doubtless," he says,

> "Congressmen in 1790 were not conversant with ethnological distinctions and had never heard of the term 'Caucasian race' mentioned in some of the foregoing decisions. They probably had principally in mind the exclusion of Africans, whether slave or free, and Indians, both of which races were and had been objects of serious public consideration. The adjective 'free' need not have been used, because the words 'white persons' alone would have excluded Africans, whether slave or free, and Indians. Still effect must be given to the words 'white persons.' The Congressmen certainly knew that there were white, yellow, black, red and brown races. If a Hebrew, a native of Jerusalem, had applied for naturalization in 1790, we cannot believe he would have been excluded on the ground that he was not a white person, and, if

> a Parsee had applied, the Court would have had to determine then just as the Circuit Court did in this case, whether the words used in the Act did or did not cover him" (p. 695).

What a court would have done at that time if a Mexican or a Syrian were to have applied, is not considered, but the court adopted squarely the classification of races by color, and considered the Parsee as included in the white race.

Judge COLT, in the District of Massachusetts in June, 1894 (*In re Saito*, 62 Fed., 126), held that a native of Japan, whom he denominated as of the Mongolian race, was not entitled to naturalization. He considered the words "white persons," which were incorporated in the naturalization laws as early as 1802, saying:

> "At that time the country was inhabited by three races, the Caucasian or white race, the Negro or black race, and the American or red race. It is reasonable, therefore, to infer that when Congress, in designating the class of persons who could be naturalized, inserted the qualifying word 'white,' it intended to exclude from the privilege of citizenship all alien races except the Caucasian."

This definition would lead to an inquiry as to the origin of all the peoples inhabiting the United States in 1802, and members of all nationalities or races then here who were not red or black would become eligible to naturalization. A perhaps stronger argument against the petitioners was advanced by Judge COLT in referring to the history of the Act of 1870 extending the privilege of citizenship to colored persons, and the proposal of Charles Sumner in 1870 to strike the word "white" from the naturalization statute, which was opposed upon the ground, among others, that the omission of this word would operate to extend naturalization to all classes of aliens and especially to Asiatics. Judge COLT also referred to Blumenbach's classification of mankind into five

principal types: The Caucasian or white, Mongolian or yellow, Ethiopian or black, American or red, and Malay or brown, simplified by Cuvier into Caucasian, Mongol and Negro, or white, yellow and black races, as well as to Professor Huxley's division into five types, viz.: Australoid (chocolate brown), Negroid (brown black), Mongoloid (yellow), Xanthochroic (fair whites), and Melanochroic (dark whites), the fair whites being the prevalent type of inhabitants of Northern Europe, and the dark whites of Southern Europe.

Judge Bledsoe, in the Southern District of California, refused naturalization to a native of Korea, a subject of Japan, who had served in the great war, and was honorably discharged (*In re Ko Sik Song*, 271 Fed., 23). The discussion in his opinion was limited largely to the effect of legislation subsequent to the Revised Statutes, and the interpretation of the phrase "white persons" was not discussed.

Judge Van Valkenburgh, in the Eastern District of Missouri (*In re Knowrk Emory Chan*, 272 Fed., 207), in denying naturalization to a native of Korea, a subject of Japan, who had served in the United States Army and had been honorably discharged, because he held the case governed by Section 2169 of the Revised Statutes, said the meaning of that section

> "has become so far clarified by late judicial decisions that we are confronted by no embarrassment in determining the question of color in so far as that controls. In *ex parte Dow* (D. C.) 211 Fed., 486, and *in re Dow* (D. C.) 213 Fed., 355, it was held that the words do not mean a person white in color, nor do they designate racial distinction, meaning Caucasian or Indo-European, but are to be construed rather as a geographical term, referring to the peoples who were commonly known in the United States as those inhabiting Europe, and whose descendants at the time of the passage of the Act of 1790 formed the inhabitants of the United States, excluding Africans. * * * In accordance with numerous holdings, the term includes, as com-

monly understood, all European races and those Caucasians belonging to the races around the Black Caucasian Sea, whether they are considered as fair whites or dark whites, and though certain of the eastern and southern European races are technically classified as of Mongolian or Turkic origin. Generally speaking, 'free white persons' includes members of the white or Caucasian race as distinct from the black, red, yellow, and brown races.

"Whether or not historically the term 'Caucasian' is accurate as a designation of the white race, it is a term which appeals to common understanding and to that of the lawmakers with practical definiteness, and the term 'white person' may now be said to have a well understood meaning."

Notwithstanding what some of these learned judges have said as to the sufficiency and clearness of the statutory definition, Congress did not rely upon it in dealing with the Chinese, but by the Act approved May 6, 1882, Section 14 (22 Stat. 58) enacted

"That hereafter no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed."

B. Scientific Authorities

The weight of scientific authority as more clearly the subject than have the varying judicial decisions.

Nelson's Perpetual Loose Leaf Encyclopedia (New York, 1921), under the title Ethnology, states:

"Opinions still differ both as regards the number and the interrelations of the primary divisions (of mankind). But the tendency now is to accept Sir Henry Flower's four groups (Negro, Mongolic, American and Caucasic) as fundamental, and to consider these, not as four distinct species, but only as four marked varieties of a single species of the genus homo."

Quatrefages' Histoire Générale des Races Humaines (Paris, 1889) divides the fundamental types of the human species into the white or Caucasian, the yellow, or Mongolic, and Negro or Ethiopic, adding (p. 299):

> "Ces noms sont mauvais. Ils reposent sur des idées fausses et ont le tort de les réveiller. Il y a des Blancs aussi noirs que n'importe quels Négres. * * * Seules, les expressions de Jaune et de Mongolique ont quelque chose de fondé."
>
> ("These names are not good. They rest on false ideas, and it is wrong to revive them. There are whites as black as any negroes. Only the expressions yellow and Mongolian have any basis.")

Brinton's classification is based largely on hair, that is, the races having black wavy hair, black wooly hair, straight dark hair or light curly hair. He maintains that the white race is geographically and historically an African race, and that the purest types of whites always have been found in greatest numbers in Western Europe and Northwestern Africa. (Races and Peoples, by Daniel G. Brinton, Philadelphia, 1901, pp. 97-100, 105-112.) He divides the Mongolian race into two great branches, the Sinitic and the Sibiric, classifying the Japanese under the latter, and says:

> "There is an undoubted white strain in Japan. The Ainos, the earliest inhabitants of Japan, are one of the most truly Caucasian like people in appearance in Eastern Asia. * * * The 'fine' type of the aristocracy, the Japanese ideal, as distinct from the 'coarse' type recognized by students of the Japanese of today, is perhaps due to the Aino."

In the dictionary prepared by the Immigration Commission, published as Volume 5, Senate Document No. 662, 61st Congress, Third Session, it is stated:

> "The number of the chief divisions or basic races of mankind is more in dispute at the present time than when Linnaeus proposed to classify them into four or Blumenbach into five great

> races. * * * In preparing this dictionary, however, the author deemed it reasonable to follow the classification employed by Blumenbach which school geographies have made most familiar to Americans, viz., the Caucasian, Ethiopian, Mongolian, Malay and American, or, as familiarly called, the white, black, yellow, brown and red races."

The Japanese are stated to stand much nearer than the Chinese, especially in language, to the Finns, Lapps, Magyars and Turks of Europe, who are the westernmost descendants of the Mongolian race.

Kingsley, in "Natural History of Man" (Boston, 1885), says:

> "The Japanese fall into two tribes, the real Japanese and the Aino. The former is a mixed people of immigrant Mongolian races and the autochthonous population whom Japanese history calls Emishi. The latter, though not identical with the Aino, are related to them. * * * Thus we find three ethnic elements: 1. The Aino, the original inhabitants of central and northern Japan. 2. A Mongolian tribe, like the better class of Chinese and Koreans, who settled in the southwestern part of the island. 3. A Malay like tribe, who first settled in the south, and then gradually spread over the whole island and conquered it" (p. 433).

Keans, "Man, Past and Present" (Cambridge, 1920), considers that the characteristics of the hair form the most satisfactory basis for a classification of mankind. Hence, he divides man into three main varieties of hair, called straight, wavy and wooly. Deniker, in "The Races of Man," adds a fourth, frizzy. Color he regards as of much less importance, and he points out that in Japan the unexposed parts of the body are generally white.

Conclusion.

The fact is, therefore, that Congress in repeating without qualification the words "white persons" has left the subject in great uncertainty. All authorities without exception agree on dismissing the idea of white as a characteristic to be demonstrated by ocular inspection. If it is sought to interpret it as an ethnological term, authorities are so conflicting that it opens the way to serious inequalities of application. To apply the ambulatory definition which some of the learned judges have adopted, is to rob the law of all definiteness and to leave it to the whim of the particular judge or court. The only safe rule to adopt is to take the term as it undoubtedly was used when the naturalization law was first adopted, and construe it as embracing all persons not black, until the Act of 1870, and after that date, as having no practical significance. If this would run counter to the intention of Congress, that body can readily amend the Act so as to make clear the legislative intention. But the subject certainly should not be left in the uncertain state in which it now is. So far as the petitioners in the present case are concerned, all that appears is that they were born in Japan and that they were duly naturalized by a state court in 1902. Every intendment of fact in favor of the jurisdiction therefore must be presumed. They may have been pure blooded Ainos, and as such "Caucasian" within the meaning of that term, as employed by most of the ethnologists and in a majority of the decisions construing the term "white persons" to mean those of the Caucasian race, so that in any event the judgment of the lower court must be reversed.

Petitioners therefore respectfully urge that the judgment of the Supreme Court of the State of Washington be reversed and the cause remanded with directions that the writ issue.

CORWIN S. SHANK,
Attorney for Petitioners.

GEO. W. WICKERSHAM,
of Counsel.